UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

THRIVES, INC. d/b/a INTERNATIONAL HOUSE OF PANCAKES (KIHEI)[1]

Employer

and

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES, LOCAL 5, AFL-CIO — Case 37-RD-324

Union

and

SANDRA SLYNGSTAD, An Individual

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed in the above-captioned case under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[1] The name of the Employer is in accord with the stipulation of the parties.

2. Based on the parties' stipulation and the record evidence, I find that the Employer is incorporated in the State of Hawaii and is engaged in the retail business of operating a restaurant. During the 12 month period ending January 31, 1999, the Employer derived gross revenues valued in excess of $250,000 but less than $500,000, and during the same period, the Employer purchased and received goods and supplies from outside the State of Hawaii valued in excess of $50,000. The Employer projects that in the period February 1, 1999, through February 1, 2000, the Employer will derive gross revenues in excess of $500,000. According to the testimony of the Employer's Vice President James West, the Employer's sales were reduced in 1998 because of a fire in the kitchen of the Kihei restaurant on June 16, 1998, which caused the closure of the restaurant until January 11, 1999, while the kitchen was being rebuilt. Based on the parties' stipulation to the foregoing facts and the testimony of West, it is concluded that the Employer is engaged in commerce and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. The petition herein was filed on November 19, 1998, in the following unit: All employees of the Employer employed at the Kihei facility on the Island of Maui, Hawaii; excluding all managerial, supervisory, security, professional and confidential employees as defined in the Act.

The Union contends that the petition herein should be dismissed on the basis that there is a contract bar to this proceeding. The Employer takes the opposite position.

On February 16, 1998, the Employer purchased the Kihei IHOP restaurant from the International House of Pancakes, Inc., Maui Hawaii d/b/a Hawaii House of Pancakes, Inc. (herein called HHP). The Employer unsuccessfully attempted to purchase another IHOP restaurant on Maui from the Employer that is located at Kahului.

The record includes the certification of representative in Case 37-RC-3741, dated March 7, 1996, certifying that the Union herein is the exclusive collective-bargaining representative in the following unit of employees:

> All employees of [HHP] employed at [HHP's] facilities on the Island of Maui, excluding all managerial, supervisory, security, professional and confidential employees as defined in the Act.

This certification covered HHP employees at the Kihei and Kahului IHOP restaurants of on Maui. The record also contains a copy of the collective-bargaining agreement between the Union and HHP effective for the period May 1, 1997, through and including April 30, 1998, that covers all employees except all managerial, supervisory, security, professional and confidential employees defined in the Act. This agreement covered the employees at the Kihei and Kahului IHOP restaurants.

As indicated above, the Employer purchased the Kihei restaurant from HHP on February 16, 1998. When the Employer took over the operation of the Kihei IHOP, it retained all the former employees of HHP who desired to remain employed there. The Employer voluntarily recognized the Union as the representative of the Kihei employees covered under the terms of the agreement between HHP and the Union.

In June 1998, a fire destroyed the kitchen of the Kihei restaurant and the Employer was forced to close down its operation. It retained all of its employees until July 1998, at which time

it laid off all but one or two employees who were retained to perform non-unit (clean up) work. The Employer assured the laid-off employees that they would be rehired when the restaurant reopened. When the repairs took longer than anticipated, the Employer repeated these assurances. The decertification petition herein was filed in November, 1998, at a time when the restaurant was still closed.

The restaurant reopened for business on January 11, 1999, and 18 or 19 of the 24 employees employed prior to the fire returned to work for the Employer. These employees did not have to re-apply for their positions and most of them retained their original hire date of February 16, 1998, for seniority purposes.

The Employer and the Union reached agreement on a new contract in December, 1998. They executed this new agreement on January 11, 1998, the same day the restaurant re-opened. The new agreement is effective by its terms for the period January 11, 1999, through and including January 10, 2000 and states that it covers "all regular employees, and on-call/casual employees of the Employer who are employed as Servers (Waithelp)., Cashiers/Host-Hostesses, Combo Workers, Cooks, and Backup/Prep Persons. . . . Excluded are all managerial, supervisory, security, professional and confidential employees defined in the National Labor Relations Act of 1947, as amended."

Analysis. As a general rule, the bargaining unit in which the decertification election is held must be co-extensive with the certified or recognized unit. See *Mo's West*, 283 NLRB 130 (1980); *WAPI-TV-AM-FM,* 198 NLRB 342 (1972); *Bell & Howell Airline Service Co.,* 185 NLRB 67 (1970); *W.T. Grant Co.,* 179 NLRB 670 (1969); *Campbell Soup Co.,* 111 NLRB 234 (1955). In the instant case, the unit originally certified by the Board and covered under the

collective-bargaining agreement between the Union and the predecessor employer covered all employees on the Island of Maui, which included employees at both the Kihei and Kahului restaurants. However, this unit was effectively severed when the Employer purchased the Kihei restaurant from HHP in February 1998. See American Recreation Centers, Inc. d/b/a Mel's Bowl, 250 NLRB 1151 (1980); see also *Clohecy Collision, Inc.,* 176 NLRB 616 (1969).

From the date it began operating the Kihei restaurant, the Employer recognized and bargained with the Union as the exclusive representative of the Kihei employees as described in the unit description contained in the contract between the Union and HHP. The fire in June 1998 caused the lay-off of virtually all of the employees represented by the Union. However, these employees possessed a reasonable expectation of recall and most of them have returned to work for the Employer when the restaurant re-opened in January 1999. Given that the employees had a reasonable expectation of recall and that there was no contract in effect that barred the instant petition at the time it was filed in November 1998, I find that it is a valid petition. Although an unfair labor practice charge blocked the processing of the petition at the time it was filed,[2] that charge has now been dismissed; the restaurant has reopened; and 18 or 19 of the 24 employees employed prior to the fire have been recalled and are now working for the Employer. In these circumstances, I find that the petition may now properly be processed. The fact that the Union and the Employer reached agreement and executed a collective-bargaining agreement subsequent to the filing of the petition does not serve to bar its processing. See *Deluxe Metal Furniture Co.,*

[2] Case 37-CA-5302.

121 NLRB 995 (1958). See also *Douglas-Randall, Inc*., 320 NLRB 431, 432 n. 8, 435 (1995); *City Markets, Inc*., 273 NLRB 469 (1984).[3]

The appropriate unit for purposes of this decertification petition are the employees at the Kihei restaurant covered under the unit description set forth in the collective-bargaining agreement between the Union and the predecessor employer HHP since that was the unit recognized by the Employer as the successor to HHP. Accordingly, I find that the proper unit for the conduct of the election in this case is as follows:

> All employees of the Employer employed at the Employer's facility at Kihei, on the Island of Maui, Hawaii; excluding all managerial, supervisory, security, professional and confidential employees as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on

[3] In *City Markets, Inc., supra,* a decertification petition had been dismissed subject to reinstatement after blocking charges were resolved. Thereafter, the union and the employer reached agreement on new collective bargaining agreements and the union unconditionally withdrew its unfair labor practice charges; no formal or informal settlement agreement was entered into. The Board held that a contract entered into during the hiatus in processing a blocked decertification petition will not bar an otherwise timely filed petition when the charges are withdrawn and the complaint dismissed. The original filing date, not the date of the request for reinstatement, was found to be the operative date for purposes of applying the Board's contract bar rule. The Board in *Douglas Randall, Inc., supra*, at 435, addressed the issue of the effect of settlement agreements on the reinstatement of petitions and ruled that an employer's agreement to bargain in settlement of unfair labor practices that occurred prior to the filing of a petition will block the reinstatement of a petition. In *Douglas-Randall, supra*, the Board stated that "Only when blocking charges have been unconditionally withdrawn without Board settlement, dismissed as lacking in merit, or litigated and found to be without merit, will a petition filed subsequent to the alleged conduct be subject to reinstatement*." Id*. The result in the instant case is

vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES, LOCAL 5, AFL-CIO**.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director of Region 20 who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Subregion 37 Office, 300 Ala

clearly consistent with this rule since the unfair labor practice charges which blocked the petition herein have

Moana Boulevard, Room 7-245, Post Office Box 50208, Honolulu, Hawaii 96850, on or before March 12, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by March 19, 1999.

DATED at San Francisco, California, this 5th day of March, 1999.

/s/ Joseph P. Norelli
Joseph P. Norelli, Acting Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735

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been dismissed.